No. 1220.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY KUZEK,

Appellant,

vs.

CHARLES F. MAGAHA and
WILLIAM ELLIOTT,

Appellees.

BRIEF FOR APPELLEES

Upon Appeal from the United States District Court for the District of Alaska, Second Division.

J. C. CAMPBELL,
W. H. METSON,
F. C. DREW,
C. H. OATMAN,
IRA D. ORTON,
Attorneys for Appellees.

The James H. Barry Co.

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STATEMENT OF THE CASE.

This suit was commenced by plaintiff and appellant to enforce compliance by defendants with the terms of a lay lease under which the defendants were engaged in mining upon a placer claim owned by the plaintiff. The lease as claimed by plaintiff is set forth in full in the complaint (Tr., pp. 4, 5, 6). It is then alleged that under the lease the defendants entered upon the claim and extracted

therefrom large dumps of pay gravel; that on May 18th, 1904, the defendants commenced sluicing the pay dumps and were still engaged in so doing, at the time the action was commenced; that on May 23d, 1904, the defendants cleaned up 54 8-100 ozs. of gold and in company with plaintiff took the same to the Alaska Banking and Safe Deposit Company in Nome, to have the same assayed, sold and divided; that since said 23d day of May, 1904, defendants continued to sluice, and on May 28th, 1904, the date of the commencement of this suit, brought into town in company with plaintiff, about 35 pounds of gold of the value of about $8,525. (Tr., pp. 6, 7.)

The complaint then alleges demand by plaintiff upon defendants that they pay and deliver to him 75 per cent. of said gold dust, amounting to about $6,057.00, that defendants refused to pay him 75 per cent, but offered him 25 per cent, which being declined, they kept the entire proceeds.

Further allegations are made that the unsluiced dumps on the premises contain gold to the amount of about $30,000.00; that unless restrained by the Court, defendants will sluice up the same and retain 75 per cent of the same; that plaintiff has no plain, speedy or adequate remedy at law. Insolvency of the defendants is alleged (Tr., p. 9).

The prayer of the complaint is as follows (Tr., pp. 9, 10):

"Wherefore plaintiff prays:

"1st. For the recovery of the possession of 75 per

cent. of the gross proceeds of gold already taken from said premises.

"2d. That this Court issue an injunction against the said defendants and each of them restraining the said defendants, their attorneys, servants, employees, agents and all persons in privity with them, or either of them, from sluicing the aforesaid dumps or extracting the gold therefrom until the final hearing of this cause.

"3d. That an accounting be had of the gold already extracted by the defendants, and that the said defendants be adjudged and decreed to deliver to this plaintiff 75 per cent of all gold so taken and extracted from said dumps by the said defendants or by any other persons or employees on their behalf.

"4th. That the plaintiff be adjudged and decreed to be the owner of 75 per cent of all the gold which is now deposited in said dumps.

"5th. Plaintiff prays that a receiver may be appointed by this Court to take charge of the dumps described in plaintiff's complaint and to protect the same during the pendency of this action, and to dispose of the same according to the judgment and decree of this Court.

"6th. Plaintiff prays for general relief.

"A. J. BRUNER,
"Attorney for Plaintiff."

In their answer (Tr., pp. 13-23), defendants deny that

on December 5th, 1903, they executed the lease in the words and figures as set forth in the complaint, and affirmatively allege substantially as follows: That on or about November 18th, 1903, plaintiff orally agreed with defendants to allow them to prospect a few days on the claim in question with a view of taking a lay; that on November 20th, 1903, the parties agreed that the defendants might continue working on a lay of 25 per cent royalty to plaintiff, and that they continued working with a thawer extracting pay dirt, but not sluicing, until about March 4th, 1904; that prior to that time no written lease had been executed, but on or about said March 4th, the lease was reduced to writing, being written by defendant Elliott, using a blank form, and that the lease so reduced to writing was substantially in words and figures as set forth in plaintiff's complaint except that it provided for the payment to plaintiff of 25 per cent royalty instead of 75 per cent as claimed by plaintiff; that said lease, drawn up on March 4th, 1904, providing for the payment of 25 per cent royalty to plaintiff "was on said "4th day of March, 1904, actually signed by plaintiff and "defendants and delivered to defendants and is and was "at all times herein mentioned the original lease in writ-"ing between the parties" (Tr., p. 15). The answer then alleges that at plaintiff Kuzek's request, the lease was dated December 5th, 1903, although never actually drawn up, signed or executed until March 4th, 1904. The circumstances of the drawing up and execution of what was in-

tended to be a duplicate of this original lease retained by plaintiff are thus alleged in the answer (Tr., pp. 15-17):

"That afterwards and on or about the 3d day of April, "1904, at the request of the said Stanley Kuzek, the said "defendant Elliott drew up a duplicate or copy of said "lease, to be retained by the plaintiff Kuzek; that in "drawing up said duplicate or copy, defendant Elliott "used the same kind of a printed blank as was used by "him for said original lease, but in copying and drawing "the same he erroneously wrote in the words '75 per "cent' to be paid to the lessor, instead of '25 per cent' "which was written in said original lease. That said "copy or duplicate of said lease so drawn up on said 3d "day of April, 1904, in which said mistake was made as "aforesaid was signed by the plaintiff and defendants "and delivered to said Kusek; and the defendants allege "on their information and belief that said duplicate copy "of said lease is the document set forth in paragraph II "of plaintiff's complaint. That in signing and executing "said duplicate or copy of said lease the plaintiff and de- "fendants both intended to execute an exact duplicate of "the original lease entered into between the parties, and "at the time the same was signed by the plaintiff and de- "fendants both the plaintiff and defendants believed said "copy or duplicate lease to be an exact and literal copy "of the original lease entered into between the parties "hereto, which provided for the payment of 25 per cent "of the gross output of said claim to plaintiff. That the "mistake made by plaintiff and defendants in copying

"and signing said lease was mutual, and was inadvert-
"ently made by the defendant Elliott in copying said
"original lease, and was not known to either the plaintiff
"or defendants until considerable time afterwards. That
"said copy or duplicate lease does not and did not ex-
"press the true agreement between the parties as set
"forth in the original lease entered into between them,
"but by said mistake and inadvertence aforesaid, it was
"made to appear thereby that the plaintiff, lessor, was
"entitled to 75 per cent of the gross output of said claim,
"whereas and in fact the true mutual agreement between
"the parties was and is that the defendants are entitled
"to 75 per cent of the gross output of said claim, and the
"plaintiff to 25 per cent. That it was not intended by
"drawing up and signing and executing said copy or du-
"plicate lease to change or modify in any particular the
"original lease in writing, entered into between the par-
"ties aforesaid."

It is then alleged that defendants have inadvertently lost or mislaid their "original lease" and that they have made long, careful and diligent search for it but were unable to find it. (Tr., p. 17.)

The other allegations of the answer refer to the amount of gold taken out and the dispute between plaintiff and defendants in relation to the division of the same. The answer prays for the following relief (Tr., p. 23):

"Wherefore the defendants pray:

"1st. That the injunction heretofore issued herein be
"dissolved.

"2d. That the Court, by its decree herein, correct said "duplicate or copy of a lease between plaintiff and de- "fendants, by changing the words '75 per cent' therein "to '25 per cent,' in so far as said duplicate or copy of "said lease may in any way affect the rights of plaintiff "and defendants.

"3d. That the Court adjudge and decree that the de- "fendants are entitled to 75 per cent of the gross output "of said dumps of pay gravel extracted by them from the "premises described in plaintiff's complaint, and that "the plaintiff is entitled to 25 per cent.

"4th. That the Court adjudge and decree that the de- "fendants be allowed to continue in possession of said "premises and sluice and clean up said dumps of pay "gravel, aforesaid, and retain therefrom 75 per cent of "the gross amount of gold produced therefrom.

"6th. That the defendants have judgment for their "costs and disbursements herein and for all other relief "which they may be in equity entitled.

"IRA D. ORTON,
"Attorney for Defendants."

A reply was filed putting in issue the alleged mistake in making the so-called duplicate lease. It was admitted however that no written lease whatever was drawn up until some time in March, when the original lease was prepared and executed and retained by defendants and also

that the so-called duplicate was not made until on or about April 4th, 1904. (Tr., pp. 27-33.)

The principal and controlling issue of fact in the case was whether or not the original lease provided for the payment of 25 per cent royalty instead of 75 per cent and whether or not the defendant Elliott in afterwards attempting to write a duplicate of the lease made a mistake in copying by writing 75 instead of 25 per cent. The Court so found in the following language quoting from the opinion: "The Court * * * finds that the allega- "tions of the plaintiff's complaint have not been sus- "tained by the evidence, and further finds that the allega- "tions of the defendants' answer as to the terms of the "original lease have been clearly and convincingly sus- "tained by the evidence." (Tr., p. 182.)

The gold contained in the dumps having been cleaned up by a receiver appointed by consent and in accordance with the prayer of plaintiff's complaint the judgment finally ordered the proceeds to be divided according to the terms of the original lease, *i. e.*, 25 per cent to plaintiff and 75 per cent to defendants. (Tr., pp. 190-191.)

ANSWER TO APPELLANT'S POINTS AND AUTHORITIES.

I.

Plaintiff's first point is that "an equitable defense "seeking the reformation of the lease was improperly "pleaded in the case at bar". There are a number of

complete answers to plaintiff's contention on this point:

First—This suit is in equity and not an action at law, which plainly appears by the allegations and prayer of the original complaint. The prayer of the complaint which contains but one cause of action is entirely for equitable relief and includes prayer for an accounting, for an injunction, the appointment of a receiver and for general relief. An injunction was actually issued and a receiver appointed.

None of the relief sought in this suit was legal. Plaintiff alleges in his complaint that he has no "plain, speedy or adequate remedy at law" (Tr., p. 9), and he is not able to ask as a part of the relief sought a judgment for any specific sum, but asks that an "accounting be had of the gold extracted by the defendants" (Tr., p. 10).

To show how satisfied plaintiff was that his suit was in equity it is only necessary to suggest that he brought it into this Court by appeal and not by writ of error (Tr., pp. 197-200). If the Court should be of opinion that the case is an action at law, we respectfully ask that the appeal be dismissed as it is well settled that if an action at law is brought into this Court by appeal intead of by writ of error, it must be dismissed for want of jurisdiction.

Bevins vs. *Ramsay,* 11 How., 185.
Mussina vs. *Cavazos,* 6 Wall., 355, 358.

Second—No objection having at any time been made to the pleading of an equitable defense, such objection is

that the so-called duplicate was not made until on or about April 4th, 1904. (Tr., pp. 27-33.)

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Bevins vs. *Ramsay,* 11 How., 185.
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Second—No objection having at any time been made to the pleading of an equitable defense, such objection is

waived. Even the objection that a suit should be at law instead of in equity is waived if not raised at the proper time.

Insley vs. *United States,* 150 U. S., 512, 515.

A case directly in point is *Shields* vs. *Mongollon Exploration Co.,* 137 Fed., 539. This case came by writ of error to this Court from the District of Alaska, and was an action at law. An equitable defense for reformation of a deed was pleaded and affirmative relief prayed for and granted. Such practice was claimed as error, but this Court in overruling the contention, through Mr. Justice Gilbert, said: "But the plaintiff in eror does not and did "not in the Court below, question the power of the trial "Court to deal with the equitable defense which was in- "terposed in the present case, nor its power to proceed "and decree affirmative relief which was accorded in the "reformation of the deed." (137 Fed., 539, 547-8.)

Third—No assignment of error is made upon this point. This is admitted by the appellant, but he insists that the alleged error is a "plain error" within the language of Rule 11 of this Court which the Court may notice at its option. The cases where the Court would so interpose are rare and certainly should not be extended to embrace an alleged error in procedure not involving the merits of the controversy. Where the defect is one which may be waived no review thereof can be had where no assignment of error is found in the record.

Clinton E. Worden Co. vs. *Cal. Fig Syrup Co.,* 102 Fed., 334 (C. C. A.)

Fourth—Even if we concede that plaintiff's action is at law, the defendants had under the Alaska Code the right to interpose thereto all the defenses which they might have, whether legal or equitable.

"The distinctions between actions at law and suits in "equity, and the forms of all such actions and suits, are "abolished and there shall be but one form of action for "the enforcement of private rights and the redress and "prevention of private wrongs, which is denominated a "civil action."

Alaska Code of Civil Procedure, sec. 1.
Carter's Ann. Code, Alaska, p. 145.

"All the forms of pleading heretofore existing in ac- "tions at law and suits in equity are abolished and here- "after the forms of pleading in Courts of record and the "rules by which the sufficiency of the pleadings is to be "determined shall be those prescribed by this Code."

Alaska Code of Civil Procedure, sec. 54.
Carter's Alaska Code, p. 155.

These sections of the Alaska Code were *not* copied from the Oregon Code, but in Oregon on the contrary the distinction between actions at law and suits in equity is preserved. That section of the Oregon Code which is similar to section 1 of the Alaska Code of Civil Procedure reads as follows:

"The distinction heretofore existing between forms of

"actions at law is abolished and hereafter there shall be "but one form of action at law for the enforcement of "private rights or the redress of private wrongs."

Oregon C. C. P., sec. 1.
I Hill's Annotated Laws of Ore., ed. 1887, p. 130.

In construing this section of the Oregon Code, the Supreme Court of Oregon has had occasion to observe that the rule in most of the code States abolishing the distinction between actions at law and suits in equity has not been adopted in Oregon, but it is the distinction between forms of actions at law only that is abolished.

Beacannon vs. *Liebe,* 11 Ore., 443.
Burrage vs. *Bonanza G. & Q. M. Co.,* 12 Id., 169.

The Oregon Code makes specific provision for suits in equity in the following language:

"The enforcement or protection of a private right or "the prevention of or redress for an injury thereto, shall "be obtained by a suit in equity in all cases where there "is not a plain, speedy nad adequate remedy at law. * *"

Oregon Code Civil Proc., sec. 380.
I Hill's Annotated Laws of Ore., ed. 1887, pp. 404, 405.

This section of the Oregon Code was not carried into the Alaska Code, and the action of Congress by abolishing the distinction between actions at law and suits in

equity in Alaska, instead of merely abolishing the distinctions between "forms of actions at law" as provided in the Oregon Code of Civil Procedure, signifies the intention of Congress to adopt the rule in force in other code States and Territories that legal and equitable relief may be sought in the same action and equitable defenses may be pleaded in actions at law.

Pomeroy in his work on *Remedies and Remedial Rights Under the Codes* (2d ed.) says at p. 107: "Another "practical effect of removing the distinction between ac- "tions at law and suits in equity is shown in the employ- "ment of equitable defenses to actions brought to enforce "legal rights and to obtain legal remedies." Sections 87 to 97, pages 107 *et seq.* of this text book contain a full discussion of this subject and is a complete answer to the appellant's contention.

The territorial statutes of the former territories of Idaho and Montana contained provisions almost if not exactly similar to the Alaskan Code, and it was held by the Supreme Court of the United States that under these codes legal and equitable relief could be obtained in the same action and by the same complaint.

Basey vs. *Gallagher,* 20 Wall., 670, 680.
Ely vs. *New Mexican, etc., R. R. Co.,* 129 U. S., 292.
Idaho, etc., Land Co. vs. *Bradbury,* 132 U. S., 509, 513.

From these authorities, it may be said *a fortiori* that an equitable defense may under such codes be properly pleaded to a complaint at law.

The answer of defendants is also criticised by appellant because it is claimed the affirmative defensive matter is not stated separately from the denials. Conceding this to be true, it is not a matter for the attention of the Appellate Court, first because it is not assigned as error, and secondly because it was not complained of or properly raised in the Court below. Such an objection is waived unless made at the proper time by demurrer or motion.

Hagely vs. *Hagely,* 68 Cal., 348.

II.

THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDINGS AND DECISION OF THE COURT CAN NOT BE CONSIDERED IN THE APPELLATE COURT BECAUSE THE BILL OF EXCEPTIONS DOES NOT CONTAIN ALL THE EVIDENCE.

Not only does the bill of exceptions in this case omit to state that it contains all the evidence introduced in the Court below, but it affirmatively appears that some very important evidence is omitted. Plaintiff's exhibit No. 3, mentioned at pages 54 and 55 of the transcript, and with reference to which defendant William Elliott testified in great detail, is omitted entirely. Photographs of this exhibit and also of plaintiff's exhibit No. 2 were offered in evidence by the defendant and admitted without objection. (Tr., p. 97.) These photographs are not contained

in the record. These exhibits and their photographs are the most important pieces of evidence introduced in the Court below because it was from an inspection of them that the Court was able to ascertain the absolute falsity of plaintiff's testimony that the part of the preliminary unsigned draft of lease providing for the royalty of 75 per cent to plaintiff was in the handwriting of defendant Elliott. And it was by this document, Plaintiff's Exhibit 3, that the Court was able to see that the plaintiff Kuzek had deliberately and wilfully written in the 75 per cent, and then wilfully sworn falsely that it was written by the defendant Elliott. A memorandum book of Mrs. Kuzek, the plaintiff's wife, produced by her to refresh her memory was introduced in evidence and marked "Defendant's Exhibit No. 3" (Tr., p. 136). Mrs. Kuzek was examined at length on this Exhibit (Tr., p. 136-145), and it was a very important item of evidence to show that both Mr. and Mrs. Kuzek were wilfully testifying falsely. No part of this exhibit is contained in the record, neither is the original brought to this Court as might be done under the rules. This exhibit was most important on the question of handwriting. The affidavit of Stanley Kuzek, "Defendants' Exhibit No. 4," and the affidavit of Bertha Kuzek, "Defendants' Exhibit No. 5," are omitted from the Bill of Exceptions (Tr., p. 181. These affidavits were used in the cross-examination of the plaintiff and his wife and were introduced to contradict and impeach them.

It is well settled that unless the bill of exceptions

shows affirmatively that it contains all the evidence the sufficiency of the evidence cannot be reviewed in this Court.

U. S. vs. *Copper Queen,* 185 U. S., 495.
Clune vs. *U. S.,* 159 U. S., 590.
Met. Nat. Bank vs. *Jansen,* 108 Fed., 572 (C. C. A.).
Nashua Sav. Bk. vs. *Anglo-Am. L. M. & A. Co.,* 108 Fed., 764 (C. C. A.).

Counsel for appellant say, on page 8 of their brief, that it may properly be assumed that the bill of exceptions contains all the evidence. To this point, counsel cite *Gunnison County* vs. *Rollins et al.,* 173 U. S., 255. In the case cited, the bill of exceptions did not expressly state that it contained all the evidence, but entries in the bill sufficiently showed that it did contain it all. This case is not in point here as there are no entries in the bill indicating that it contains all the evidence, but, on the contrary, it appears that some of it omitted.

III.

THE ASSIGNMENTS OF ERROR ARE NOT SUFFICIENT TO AUTHORIZE THIS COURT TO REVIEW THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDINGS AND DECISION OF THE COURT.

Preliminarily to a discussion of this point, it may also be observed that the brief of appellant does not contain

any specification of errors relied on, as required by rule 28 of this Court. In such a case this Court may disregard all assignments of error and affirm the judgment below.

Western Assur. Co. vs. Polk, 104 Fed., 649; 44 C. C. A., 104.

The assignment of errors is contained in the transcript at pages 201 to 205. It contains no assignments whatever on the sufficiency of the evidence to support the findings and decision. The first twelve assignments are in relation to the rulings of the Court on admission of evidence. Assignment number thirteen specifies that the Court erred in overruling the motion for a new trial, which is not assignable as error in this Court. Assignment number fourteen insists that the Court erred in dissolving the injunction originally issued. (Tr., p. 204.) This assignment is not referred to in appellant's brief. The three last assignments of error are as follows:

XV.

The Court erred in rendering a decree that Plaintiff's Exhibit No. 2 be reformed by striking out the figure "75" in paragraph 4 thereof, and answering in lieu thereof the figures "25."

XVI

The Court erred in rendering a decree in favor of defendants Chas. F. Magahe and William Elliott, and against the plaintiff Stanley Kunek.

XVII

The Court erred in not making, rendering and entering a decree in favor of the said plaintiff Stanley Kuzek, and against the defendants Chas. F. Magaha and Wm. Elliott, adjudging that plaintiff was entitled to an accounting of the gold extracted by defendants, and that plaintiff required 75 per cent of the gross proceeds of gold taken by defendants from the premises described in plaintiff's complaint.

That general assignments of this character are insufficient to authorize a review of the evidence is settled by a long line of decisions.

Deering Harvester Co. vs. *Kelly,* 103 Fed., 261; 43 C. C. A., 225.

Smith vs. *Hopkins,* 120 Fed., 921.

United States vs. *Lee Yen Tai,* 113 Fed., 465; 51 C. C. A., 299.

Richardson vs. *Walton,* 61 Fed., 535; 9 C. C. A., 604.

Metropolitan Nat. Bank vs. *Rogers,* 53 Fed., 776; 3 C. C. A., 666.

Sovereign Camp, Woodmen of the World vs. *Jackson,* 97 Fed., 382; 38 C. C. A., 208.

Louisiana A. & M. R. Co. vs. *Board of Levee Comrs., etc.,* 87 Fed., 594; 31 C. C. A., 121.

United States vs. *Ferguson,* 78 Fed., 103; 24 C. C. A., 1.

McFarlane vs. *Golling,* 76 Fed., 23; 22 C. C. A., 23.

Fox vs. *Haarsteck,* 156 U. S., 678.

Appellant's counsel cite the cases of *Ridings et al.* vs. *Johnson,* 128 U. S., 212, and *Central Trust Co.* vs. *Seasongood,* 130 U. S., 482, to the point that on an appeal in an equity suit the whole case is before the Court, and they are bound to decide it in so far as it is in a condition to be decided. We have carefully examined these cases as well as *Buckingham et al.,* vs. *McLean,* 13 How., 150, and although we are not inclined to dispute the proposition made by appellant, the cases cited are not to the point. At any rate, the rule is that in the absence of proper assignments of error the Court will not examine every point in the case. Proper assignments of error are just as necessary in equity as in other cases.

Randolph vs. *Allen,* 73 Fed., 23, 29 (C. C. A.).
Farrar vs. *Churchill,* 135 U. S., 609.

It may also be remarked that in discussing the question of what is before the Court on an appeal in equity, counsel have forgotten their contention that this is an action at law.

IV.

THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE FINDINGS AND DECISION OF THE COURT CAN NOT BE REVIEWED BECAUSE NO EXCEPTIONS WERE TAKEN OR RESERVED TO THE FINDINGS.

Section 372 of the Alaska Code of Civil Procedure,

referring to the trial of suits of an equitable nature, provides as follows:

"* * * In all such actions the Court, in rendering "its decision therein, shall set out in writing its findings "of fact upon all the material issues of fact presented by "the pleadings, together with its conclusions of law "thereon; but such findings of fact and conclusions of "law shall be separate from the judgment and shall be "filed with the clerk and incorporated in and constitute "a part of the judgment roll of the case; and such find- "ings of fact shall have the same force and effect and be "equally conclusive, as the verdict of a jury in an action. "*Exceptions may be taken during the trial to the ruling* "*of the Court, and also to its findings of fact, and a state-* "*ment of such exceptions prepared and settled as in an* "*action,* and the same shall be filed with the clerk within "ten days from the entering of the decree (judgment) "or such further time as the Court may allow."

Carters Alaska Code, p. 226.

That exceptions to the findings under this section are necessary, see:

8 Ency Pl. & Pr., p. 275, and cases cited, also:
Marks vs. *Crew et al.,* 14 Ore., 382; *S. C.,* 13 Pacific, 55.
Verdier vs. *Bigne,* 16 Pacific, 64, 66 (Oregon).

It must have been intended to require specific excep-

tions to findings to authorize their review in the Appellate Court, otherwise the provisions of this section in relation to the taking of such exceptions would be useless and without meaning.

V.

NO ERROR WAS COMMITTED BY THE COURT IN ITS RULINGS UPON THE ADMISSION OF EVIDENCE.

Before discussing this point we desire to call the attention of the Court to the fact that the brief of appellant contains no specification of the alleged errors in the admission of evidence, as required by the rules of this Court. Under such circumstances, this Court may properly refuse to consider them.

> *Haldane* vs. *United States,* 69 Fed., 819; *16 C. C. A.,* 447.

The first three assignments of error are not mentioned in any part of appellant's brief. As to all the other assignments of error upon the admission of evidence with the exception of assignment No. VI, no attempt is made either in the assignment of errors or in appellant's brief to comply with that part of rule 11 of this Court, which requires that "when the error alleged is to the admission "or to the rejection of evidence, the assignment of errors "shall quote the full substance of the evidence admitted "or rejected." Under such circumstances, this Court is under no obligation to consider these assignments.

Cass County vs. *Gibson,* 107 Fed., 363; *46 C. C. A.,* 341.

Counsel for appellant have so intermingled their argument on all assignments relating to evidence touched upon by them with their argument upon the sufficiency of the evidence that it is difficult to answer them in order.

The first assignment on admission of evidence mentioned by appellant's counsel is No. IV, that the Court erred in permitting the witness Cowden to testify as to his reason for carefully examining the original lease. (Appellant's brief, p. 16; Tr., pp. 69-70.) Counsel cite no authority and give no reason for their "opinion" that the action of the Court was erroneous. In our opinion, no error was committed. As the point of the witness Cowden's testimony was that he remembers the original lease provided for the payment of twenty-five per cent to the lessor and not seventy-five, it was perfectly proper for him to state the reason, if any, why he particularly examined the document with reference to this point.

Appellant's counsel next complain of the admission in evidence of declarations and statements of the witness Kuzek to the effect that he was to receive only twenty-five per cent royalty. It is objected that certain of the conversations took place before the original lease was signed—as an instance, the testimony of the witness Taylor in relation to a statement of Mr. Kuzek the day immediately preceding the execution of the lease. The testimony complained of is set forth on page 17 of appellant's brief. The fact that this admission was made the

day before the execution of the lease is in our opinion of no importance when we consider that it is admitted by the pleadings and by plaintiff in his evidence that the defendants had for several months been operating on an oral lay, and the original lease only put in writing the former oral agreement of the parties. This is a sufficient answer to the suggestion that the parties may have modified their previous oral understanding. Counsel cite no authority for their contention that the admissions of plaintiff testified to by the various witnesses were incompetent. The case of *Marvin* vs. *Bennett et al.*, 26 Wend., 168, does not touch on the competency, but only on the weight and value, to be given such admissions.

It is also complained that error was committed in admitting certain evidence of the usual amount of royalty reserved by lessors in leasing claims of the character and in the same neighborhood as the claim in question. Such testimony was clearly admissible as showing the gross inadequacy of the consideration which would be received by the laymen, if they should receive but 25 per cent of the output. Such testimony is always admissible. "While inadequacy of price, however gross, is not of it-"self sufficient ground to set aside or reform a contract "between parties standing on an equality, it is a material "fact, and in connection with other facts may amount "to proof of fraud or mistake."

Baldwin vs. *National Hedge and Wire Fence Co.*, 73 Fed., 574, 584 (citing *Bigelow Frauds*, 137;

Kerr, Fraud & M., 186; *Story, Eq. Jur.*, sec. 246; *Howard* vs. *Edgell*, 17 Vt., 9.)

A case directly in point is *Gillis* vs. *Arringdale*, 47 S. E., 429 (N. C.)

It is also claimed by appellant that the witness Cowden was not qualified to state the usual amount of royalty. At page 76 of the transcript, he is asked, without objection: "Q. I will ask you if you are familiar "with the usual rate of royalty that is paid upon mines "at and near Peluk creek, of the same kind and character "as the claim in dispute?" To this question he answered: "A. I am." A question almost identical was asked the witness Marsh (Tr., p. 79) and he made like answer.

Appellant also claims (appellant's brief, p. 20) that one witness Johnson did not give any date as to the conversation with Kuzek as to the amount of royalty the defendants were to receive. While no date is given, it appears that it was while the defendants were working under the lease. It therefore follows conclusively that it must have been after the lease was entered into. (Tr., p. 90.) Such a criticism is hypercritical. As to the testimony of the witness Greve, while it is true the conversation was before the written instrument was executed, it was after defendants were at work under the lease which was afterwards reduced to writing.

The evidence of United States Commissioner Reed as to the purpose for which the original lease was brought to him was clearly competent. He testified as to its con-

tents and it was proper to show what examination he made of it. (Tr., p. 93.)

As to the conversation between the witness Taylor and defendant Elliott complained of by appellant on page 21 of his brief, it may be answered that it is not the testimony mentioned in the twelfth assignment of error. This assignment which, however, does not conform to the rules of this Court, reads as follows: "The Court "erred in permitting the defendant Elliott to testify as "to a conversation held between himself, D. M. Taylor "and the plaintiff, as to the terms of the lease, which con- "versation was held before the contract of lease was re- "duced to writing." The evidence referred to by this assignment is not the statement by the witness Taylor: "Sure, I think it will" (Tr., p. 95) as stated on page 21 of appellant's brief, but the following found at page 96 of the transcript:

"Mr. Taylor asked when I would be in town. I told "him possibly the next day. He told me to bring my "lease with me. I told him it wasn't made out yet; that "we just had an oral agreement between us. I said, 'we " 'get 75 per cent of what comes out of the ground up " 'to June 5th; Kuzek can tell you the same,' and Kuzek "says 'that is right; you can get your paper right off " 'and take them up with you.' The next day we reduced "the agreement to writing."

The admissibility of this character ot testimony has already been discussed by us.

We have referred to all the alleged errors in the admission of evidence discussed in appellant's brief and respectfully submit even if properly before the Court they are entirely without merit.

VI.

THE EVIDENCE IS SUFFICIENT TO JUSTIFY THE DECISION OF THE COURT.

Counsel for appellant have discussed the sufficiency of the evidence at considerable length. Representing the appellees, we are at considerable disadvantage in this discussion, owing to the failure of the appellant to include in the bill of exceptions the original unsigned draft of lease, "Plaintiff's Exhibit No. 3" and the photographic copies of this exhibit, and "Plaintiff's Exhibit No. 2." The strongest point made by appellant and stated over and over again in his brief, is that the unsigned draft of lease provided for the payment of 75 per cent to the lessor, and that it was also in the handwriting of defendant Elliott. (Appellant's brief, pp. 23, 30, 31, 33.)

In this contention counsel is in error. Had the learned counsel who filed appellant's brief in this Court been present at the trial in the Court below we believe they would not have pressed this point so insistently. The unsigned draft of lease was partially filled out when defendant Elliott commenced to complete it. It had been partially filled out by the plaintiff Kuzek. (Tr., pp. 101-102.)

Elliott did not write that portion of the original draft of lease which provided for the payment of 75 per cent of the gold to plaintiff. That portion of the draft was afterwards written in by the plaintiff Kuzek in order to make it agree with the duplicate signed copy made in April, and for the express purpose of attempting to make the Court believe that defendant Elliott had twice, in different documents, written the words and figures, "75 per cent to the lessor." The plaintiff Kuzek and his wife both wilfully swore falsely that Elliott had written the words and figures, "75 per cent," in the draft of lease. This false testimony took from their evidence all its credibility. If this Court had before it the original exhibits or the photographs of them, it would be made plain that both plaintiff and his wife had, by reason of ignorance and avarice, committed a very crude forgery and attempted to sustain it by perjury. Owing to the fact that these exhibits are not in the record, no ocular demonstration of this fact can be made to this Court, but it can be shown from some of the testimony in the record.

When the defendant Elliott was being cross-examined the following occurred:

"(Witness was here handed a draft of a lease claimed to have been made on the same day the original lease was executed.)

"Q. At that time did you have this paper, did you see this paper there at that time?

"A. No, that one was never produced at that time.

"Q. I will ask you to look that over.

"A. I remember when that—this was with the first one.

"Q. Who wrote that?

"A. I wrote the lower part.

"Q. Who wrote this here?

"A. I don't know where you mean.

"Q. This writing here where it says, 'Pay to said lessor'—

"A. Let me look at that just a minute please.

"Q. Yes, sir. (Hands witness paper.) Plaintiff's Exhibit No. 3.

"A. There is two figures here I never wrote.

"Q. What are they?

"A. The '75' and this here 'H-e-s.'

"Q. You never wrote that?

"A. I will testify I never wrote that, that is not my figures.

"Q. You are absolutely positive of that?

"A. I am positive that is not my figures."

At the request of plaintiff's attorney, the plaintiff Elliott wrote his name, the word "his," the figures "175" and "1903." These exemplars of his handwriting were introduced in evidence without objection, marked "Plaintiff's Exhibit No. 4." (Tr., p. 64.) As they are not contained in the bill of exceptions it is impossible for this Court to make the comparisons made by the Court below. The omission of this important exhibit further illustrates the impossibility of properly reviewing the evidence in this Court.

On re-direct examination the same witness testified, in relation to the unsigned draft, "I did not write the word 'legal' nor the figures '75' after word assigns." (Tr., p. 62.) He also testified as follows referring to "Plaintiff's Exhibit No. 3":

"Q. After the word 'during,' the balance of the pencil writing before the words 'and that the lessor' did you write that? A. I did; yes, sir.

"Q. The word 'his' before 'legal representatives' in the last line of paragraph IV, did you write that?

"A. It is mine, that is my writing, I always make an 'h' like that, in all my writing, I always write it that way; I never start at the bottom, you never find any word wherever I use 'h' in it where I got it in the other way, I never start it that way unless there are two words together where I would have to run up.

"Q. No I will ask you to state, Mr. Elliott, whether or not the word 'h-e-s' or 'h-e-r,' or whatever that is before—in the fourth paragraph of this so-called draft of the lease, Plaintiff's Exhibit No. 3, the word in pencil writing, immediately before the words 'legal representatives or assigns' was written on the paper that day? A. It was not written in my presence.

"Q. Was the word or figures '75' after the word 'assigns' in the same paragraph written that day?

"A. They were not placed on that by me, and I never saw them there." (Tr., pp. 62-3.)

The plaintiff Kuzek first testified that he did not write the figures 75 in the unsigned draft, Exhibit 3:

"Q. Come down to the word legal in the fourth paragraph; that looks like h-e-s, did you write that?

"A. No, sir.

"Q. You are positive of that?

"A. Positive.

"Q. You are absolutely positive about that?

"A. Yes, sir.

"Q. And this '75' did you write that?

"A. No, sir.

"Q. You are positive of that?

"A. Positive, yes, sir."

(Testimony of Kuzek. Tr., p. 155.)

After having been examined with reference to a note book containing specimens of his handwriting (Tr., pp. 158-164) he changed his testimony and admitted that he might have written the word "h-e-s" and the figures "75" in the unsigned draft. The testimony is as follows:

"Q. You are absolutely sure that you didn't write the word 'h-e-s' immediately before 'legal representatives'?

"A. No.

"Q. You are not absolutely sure. Are you absolutely sure that *you didn't write the figures '75' in the first line of paragraph fourth?*

"A. No, sir."

That these pivotal words were written in the unsigned draft by Kuzek himself could, we claim, be shown conclusively, if the original exhibits or their photographs were before the Court. Counsel say, with reference to the ex-

pert testimony on the question of the handwriting, "as "the photographs of the documents themselves are not "attached to the record, nor the originals before this "Court, the testimony and references to them given by "this witness is obscure and valueless."

Not so, however, to the Court below. Can appellant ask this Court to reverse the findings of the Court below when the evidence which controlled the decision, or may have controlled the decision of the Court below, is not before the Appellate Court? If appellant desired to have this question reviewed he should have brought the necessary documents to this Court.

To sustain the findings of the Court we have the positive evidence of the defendant Elliott (Tr., pp. 41-62), corroborated by his co-defendant, Magaha (Tr., pp. 65-67); the evidence of D. M. Taylor (Tr., pp. 67-68), who saw the original lease and who testified that "it provided a royalty of 25 per cent"; the testimony of C. G. Cowden, cashier of the Alaska Banking and Safe Deposit Company, who also saw, read, and closely examined the original lease, and who also testified that it provided a percentage of 25 per cent to the owner (Tr., p. 69); the testimony of T. M. Reed, United States Commissioner (Tr., p. 93), and Fred Strehlke (Tr., p. 68) to the same effect. We also have the evidence of eleven witnesses who testified to statements by plaintiff that he was to receive but 25 per cent, and a large number of witnesses who testified to the usual rental, showing that the reservation of 75 per cent to the owner would be three times the

usual amount. We also have the expert testimony showing that the figures 75 in the unsigned draft were written by Kuzek (Tr., pp. 97-99).

It is claimed by appellant and very strenuously argued in his brief, that the mistake was due to the negligence of Elliott, and for that reason he should be denied relief. While it is true that equity has many times refused relief where a mistake was caused wholly by the negligence of the complaining party, the books are full of cases where carelessness on his part will not necessarily prevent him from obtaining relief in a court of equity. It will be borne in mind that it was fully proved in the Court below that there was no mistake in the original lease; that it provided for the payment of 25 per cent to plaintiff Kuzek. A mistake in making what was intended to be a duplicate could not in any way affect the validity of the original. Neither can it be said that a mistake by defendant Elliott in copying was negligence as a matter of law. It is alleged in the answer that the mistake was "inadvertently" made by the defendant Elliott in copying the original lease (Tr., p 16. It was claimed by the appellant's counsel in the trial court that "inadvertence" and "negligence" were synonymous terms, it being so stated in our best dictionaries, and that equity would in no case relieve a person from the consequences of inadvertence. That equity will relieve from mistakes inadvertenly made is, however, settled by many authorities.

Thompson vs. *Phenix Ins. Co.*, 136 U. S., 287, 296.
Wasatch Min. Co. vs. *Crescent Min. Co.*, 148 U. S., 293, 298.
Colton et al. vs. *Lewis et al.*, 119 Ind., 181.

In *Thompson* vs. *Phenix Ins. Co.*, just cited, speaking of the reformation of an insurance policy, the Court said: "If by *inadvertence*, accident or mistake, the terms "of the contract were not fully set forth in the policy, "the plaintiff is entitled to have it reformed * * *"

Can it be said that the inadvertence of Elliott in incorrectly copying the original lease was culpable negligence? Are not mistakes in copying frequently made by very careful persons?

Mistake has been defined as follows: "Mistake may "be said to be some unintentional act, omission or error "arising from unconsciousness, ignorance, forgetfulness, "imposition or misplaced confidence."

Kerr on Fraud and Mistake, p. 396.

The same author further says (p. 407): "What is the "nature or degree of mistake which is relievable in "equity as distinguished from mistake which is due to "negligence and therefore not relievable, cannot well be "defined so as to establish a general rule, *and must in a "great measure depend on the discretion of the Court "under all the circumstances of the case.*"

Pomeroy in his work on Equity Jurisprudence says:

"It has sometimes been said that a mistake resulting

"from a complaining party's own negligence will never "be relieved. This proposition is not sustained by the "authorities. It would be more accurate to say that "where the mistake is wholly caused by the want of that "care and diligence in the transaction which should be "used by every person of reasonable prudence, and the "absence of which would be a violation of legal duty, a "court of equity will not interpose its relief; but even "with this more guarded mode of statement each in- "stance of negligence must depend to a great extent upon "its own circumstances. It is not every negligence that "will stay the hand of the Court. The conclusion from "the best authorities seems to be, that the neglect must "amount to the violation of a positive legal duty. The "highest possible care is not demanded. Even a clearly "established negligence may not of itself be a sufficient "ground for refusing relief if it appears that the other "party has not been prejudiced thereby."

2 Pomeroy's Eq. Jur., sec. 856. (3d ed.)

A case very much in point is *Russell* vs. *Mixer,* 42 Cal., 475. It was there held, quoting the syllabus: "Equity "will grant relief against a mistake by which parties, "through their own ignorance or inattention, fail to se- "lect or prepare a proper kind of instrument to effect- "uate their agreement and intention, the same as if such "mistake were made by a scrivener."

Among examples of cases where a certain degree of

carelessness or inattention was held not to bar relief may be cited the following:

Wilson vs. *Moriarity,* 88 Cal., 207, 26 Pac., 85.
Monroe vs. *Skelton,* 36 Ind., 302.
Schautz vs. *Keener,* 87 Ind., 258.
Baker vs. *Pyatt,* 108 Ind., 61, 9 N. E., 112.
Keister vs. *Myers,* 115 Ind., 312, 17 N. E., 161.
Snyder vs. *Ives,* 42 Iowa, 157.
Miller vs. *Small,* 10 S. W., 810 (Ky.)
Hitchins vs. *Pettingill,* 58 N. H., 3.
Albany City Sav. Inst. vs. *Burdick,* 87 N. Y., 40.
Paisley vs. *Casey,* 18 N. Y. Supp., 102.

Counsel for the appellant have cited and quoted from a large number of cases in relation to the amount of proof required to show mistake. With most of these authorities we have no quarrel, but notwithstanding the rule stated in many ways that very strong proof is required, the testimony need not be free from conflict.

If the proofs of mistake are entirely plain and satisfactory, relief by way of reformation will be granted though the mistake is denied and there is a conflict of testimony.

Baldwin vs. *Nat. Hedge & Wire F. Co.,* 73 Fed., 574; 19 *C. C. A.,* 575.

"Relief, however, is not denied because there is con-
"flicting testimony, for that would result in a denial of
"justice in some of the plainest cases."

Same citation, citing *Beach Eq. Jur.,* Sec. 546.

A recent case decided by this Court states the rule in cases of mistake as follows:

"We find in the evidence no ground for saying that "the trial court disregarded the rule that in each case "the burden rests upon the moving party of overcoming "the strong presumption arising from the terms of a "written instrument, and that if the proofs are doubtful "and unsatisfactory and there is a failure to overcome "the presumption by testimony entirely plain and con- "vincing beyond reasonable controversy, the writing "will be held to express correctly the intention of the "parties. *Nearly all the testimony was taken in open "court and the judge who heard the case had the oppor- "tunity to observe the demeanor of the witnesses and to "judge concerning their credibility.* There was testi- "mony *to the effect that Conrad Siem had prior to the "commencement of the suit expressly admitted the mis- "take. Findings of fact so made on conflicting evidence "cannot be reviewed by this Court unless a serious and "important mistake appears to have been made in the "consideration of the evidence, or an obvious error has "intervened in the application of the law. This rule is "so firmly established by the decisions of this and other "courts as to require no citation of authorities."*

Shields vs. *Mongollon Co.*, 137 Fed., 539, 546.

That the judge of the court below gave full consideration to the rules in relation to the amount and kind of proof required in cases of this kind is apparent from his

opinion finding "that the allegations of the defendant's "answer as to the terms of the original lease have been "*clearly and convincingly* sustained by the evidence" (Tr., p. 182).

Appellant's criticism of the opinion of the Court below that it finds "That the allegations of plaintiff's complaint have not been sustained by the evidence," while certain facts alleged therein, such as the ownership of the claim in question, were admitted by defendants, is captious and without merit (Appellant's Brief, p. 30). It is too plain for argument that the Court referred only to the allegations of fact put in issue.

It is respectfully submitted that the decision of the Court below was right upon both law and fact and was consonant with justice and equity and should be affirmed.

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